IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PAUL E. McCORMICK, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, NBC UNIVERSAL, Respondent Employer, ELECTRIC INSURANCE COMPANY, Respondent Insurer.	2 CA-IC 2007-0009 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20061-570439

Insurer No. WC100558174

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

Dix, Forman & Kern, P.C.
By Robert J. Forman — Tucson
Attorneys for Petitioner Employee

The Industrial Commission of Arizona
By Laura L. McGrory — Phoenix
Attorney for Respondent

Jardine, Baker, Hickman & Houston
By K. Casey Kurth — Phoenix
Attorneys for Respondent Employer
and Respondent Insurer

E S P I N O S A, Judge.

¶1 In this statutory special action, petitioner Paul McCormick challenges the decision of the administrative law judge (ALJ) denying him benefits for a subsequent non-industrial injury. McCormick contends the ALJ erred by finding his conduct that resulted in the subsequent injury unreasonable. Finding no reversible error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the ALJ's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In May 2006, McCormick injured his left knee in an industrial accident. Respondent employer NBC Universal and respondent insurer Electric Insurance Company accepted his claim, and McCormick eventually underwent surgery to repair his knee. While recovering from that surgery and still subject to limitations on his activities, McCormick attended a Labor Day party at a local bar. As he was leaving the bar, he observed a person,

described variously as a "boy," "female," "kid," or "vagrant" carving on a wooden fence in the bar's parking lot. McCormick confronted the vagrant, who at some point banged on McCormick's car and "may have flashed a knife." McCormick eventually left his car to follow as the vagrant walked away. When the vagrant stopped and turned around, McCormick remembered the vagrant had a knife; McCormick began "planning to defend [him]self." He placed all of his weight on his injured left leg and "hopped." When he did so, his leg gave way and he fell to the ground.

¶3 McCormick's left leg had fractured and required a second surgery to repair. He sought workers' compensation benefits for the second surgery as a subsequent injury and the respondents denied his claim. After a hearing, the ALJ found McCormick's conduct had been unreasonable and denied him benefits for the non-industrial injury. That decision was upheld on review, and this statutory special action followed.

Discussion

¶4 McCormick argues the ALJ erred by denying his claim for benefits in connection with the second surgery and related expenses, insisting his conduct was reasonable. NBC and its insurer, Electric, argue that McCormick failed to prove his conduct was reasonable, and thus, the ALJ correctly denied his claim for benefits. We will affirm an ALJ's award if it is reasonably supported by the evidence. *See Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16, 41 P.3d 640, 643 (App. 2002). If an employee suffers an injury "arising out of and in the course of his employment," the employee may be entitled to workers'

compensation benefits. A.R.S. § 23-1021(A). The employee is required to show that the injury is compensable. *See Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). "It is settled that a claimant's unreasonable intentional conduct may constitute a superceding cause of a new condition so as to preclude compensation for it." *Mercante v. Indus. Comm'n*, 153 Ariz. 261, 265, 735 P.2d 1388 (App. 1987). Usually, the intentional act that precludes compensation for the injury is "an act which was, in itself, highly inappropriate in the light of the claimant's knowledge of his condition." *Allen v. Indus. Comm'n*, 124 Ariz. 173, 177, 602 P.2d 841, 845 (App. 1979) (Haire, J., dissenting).

¶5 McCormick requests benefits for a non-industrial injury. Such an injury may be compensable if it is proven (1) the non-industrial injury was a natural and direct consequence of his original, industrial injury and (2) the conduct resulting in the non-industrial injury was reasonable, in light of the employee's knowledge about the effects of the original, industrial injury. *See Klosterman v. Indus. Comm'n*, 155 Ariz. 435, 437, 747 P.2d 596, 598 (App. 1987); *Dutton v. Indus. Comm'n*, 140 Ariz. 448, 451, 682 P.2d 453, 456 (App. 1984); *O'Donnell v. Indus. Comm'n*, 125 Ariz. 358, 361, 609 P.2d 1058, 1061 (App. 1979). The uncontradicted medical testimony at the hearing showed McCormick's leg would not have fractured without the deficits caused by the prior surgery. This supports the ALJ's conclusion that McCormick satisfied the first prong of the test by showing his non-industrial injury was directly related to the first, industrial injury. *See Klosterman*, 155 Ariz. at 437,

747 P.2d at 598; *Dutton*, 140 Ariz. at 451, 682 P.2d at 456; *O'Donnell*, 125 Ariz. at 361, 609 P.2d at 1061.

¶6 The ALJ denied McCormick benefits, however, because he found McCormick had not proved his conduct had been reasonable, as the second prong of the test requires. The ALJ found that McCormick had "left [a place of] safety" to pursue the vagrant and "hopped" on his injured leg, despite knowing his previous injury was not fully healed, and concluded McCormick had conducted himself unreasonably. At the hearing, Dr. Parseghian, who treated the initial industrial injury, testified that, at the time of the non-industrial injury, McCormick was allowed to exercise in a gym or walk but was restricted from jogging or trying to run. McCormick was still in physical therapy for the first injury and Parseghian had not yet permitted him to return to work. When McCormick saw Parseghian after the non-industrial injury, he told the doctor the injury occurred from "walking, [McCormick] loaded his leg and it gave out." Dr. Ruth, who treated the non-industrial injury, testified the emergency department notes showed McCormick was intoxicated when he arrived at the hospital and the emergency personnel who took information from McCormick reported there had been a fight at a bar and he had been injured.

¶7 McCormick testified he had not yet been released for work when the non-industrial injury happened. He stated he had been in his car with the windows up and the doors locked before he had gotten out of the car to follow the vagrant. McCormick claimed he had been on the phone with a 9-1-1 operator, who asked for a description of the vagrant,

and he had left the car "because the [vagrant was] walking away from [him] and he [could] no longer see them and describe them" to the police. McCormick acknowledged the vagrant was never closer than ten to fifteen feet from him. He provided several descriptions of his actions just before his leg broke, stating he had "stood up on one leg, stopped fast," or "stood up on one leg" and made "a little hop"on the injured leg. Finally, he testified it was "all a blur" to him.

¶8 The police reports from that night, which were admitted into evidence, do not mention McCormick's claim that he was on the telephone with 9-1-1 at the time the incident occurred and was following the vagrant at the operator's suggestion. McCormick's fiancee, Dana Davis, testified she remembered the car windows had been down and the car had been rolling to leave the parking lot when McCormick had turned the car around, stopped, and gotten out. At that point, the vagrant was walking away through the dark parking lot, and McCormick followed. The police reports reflected Davis had told police at the scene that McCormick "got out [of] the vehicle and went after the [vagrant] to find out what [his or her] problem was." She, too, did not mention McCormick's 9-1-1 call to police at the scene. At the hearing, she simply said, "the kid took off[,]" and "[McCormick] went to follow him and [tell] the cops what he looks like."

¶9 Because "[t]he ALJ is the sole judge of witness credibility," we "will not substitute [our] judgment for that of the ALJ." *Glodo v. Indus. Comm'n*, 191 Ariz. 259, 262, 955 P.2d 15, 18 (App. 1997). Even under McCormick's version of the events, which the

ALJ expressly accepted, the evidence showed McCormick was aware he would not be able to run away when he decided to follow the vagrant, regardless whether he did so at the urging of a 9-1-1 operator, and that he left his car, which was either stationary but closed and locked or actually moving out of the parking lot, in order to do so. Based on this record, we cannot say the ALJ erred in finding McCormick's conduct unreasonable in light of the effects of the May 2006 industrial injury.

Disposition

¶10 The ALJ's award is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge